APPENDIX A

CLD-009

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-2236**

NATHAN TERRY, Appellant

VS.

SUPERINTENDENT DALLAS SCI, ET AL.

(E.D. Pa. Civ. No. 2-20-cv-03521)

Present: AMBRO, SHWARTZ and BIBAS, Circuit Judges

Submitted are:

(1) Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's Motion for Suspension of Parole

in the above-captioned case.

Respectfully,

Clerk

ORDER

Appellant's request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c). Jurists of reason would not debate whether the District Court was correct in its disposition of the petition. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000). For essentially the reasons provided by the District Court, Appellant's claims alleging errors of state law are not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). Appellant's "motion for suspension of parole" is denied as meritless or not properly raised on appeal. Simko v. U.S. Steel Corp., 992 F.3d 198, 205 (3d Cir. 2021).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2236

NATHAN TERRY,

Appellant

v.

SUPERINTENDENT DALLAS SCI; DISTRICT ATTORNEY MONTGOMERY COUNTY; ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA

(District Court No.: 2-20-cv-03521)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge*, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY and PHIPPS, Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

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* Judge Smith completed his term as Chief Judge and assumed senior status on December 4, 2021. At the time the petition for rehearing was submitted to the en banc panel, Chief Judge Smith was an active judge of the Court. 3rd Cir. I.O.P. 9.5.2.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **denied**.

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: December 16, 2021
JK/cc: Nathan Terry
Ronald Eisenberg, Esq.

ALD-167 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1419

IN RE: NATHAN TERRY,
Petitioner

On a Petition for Writ of Mandamus from the
United States District Court for the Eastern District of Pennsylvania
(Related to E.D. Pa. Civ. No. 2:20-cv-03521)

Submitted Pursuant to Rule 21, Fed. R. App. P.
April 29, 2021
Before: MCKEE, GREENAWAY, Jr., and BIBAS, Circuit Judges

(Opinion filed: June 25, 2021)

OPINION*

PER CURIAM

Petitioner Nathan Terry seeks a writ of mandamus. For the reasons below, we will deny his petition. Additionally, we will direct the Clerk of our Court to transfer his filing docketed April 22, 2021, in this Court to the United States District Court for the Eastern District of Pennsylvania to be docketed as a notice of appeal.

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

APPENDIX B

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **denied**.

BY THE COURT,

s/ THOMAS L. AMBRO
Circuit Judge

Dated: December 16, 2021
JK/cc: Nathan Terry
Ronald Eisenberg, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN TERRY, Petitioner, v. KEVIN RAMSON, *et al.*, Respondents.	:	CIVIL ACTION No. 20-cv-03521-JMG

ORDER

AND NOW this _____day of _____, 2021, upon careful and independent consideration of Nathan Terry's Amended Petition for Writ of Habeas Corpus (Doc. No. 17), the Commonwealth's response in opposition (Doc. No. 43), and the Report and Recommendation of U.S. Magistrate Judge Richard A. Lloret, it is **ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Richard A. Lloret is **APPROVED** and **ADOPTED**;
2. Mr. Terry's Petition for Writ of Habeas Corpus is **DISMISSED** with prejudice by separate Judgment, filed contemporaneously with this Order. *See* Federal Rule of Civil Procedure 58(a); Rules Governing Section 2254 Cases in the United States District Courts, Rule 12;
3. No certificate of appealability shall issue under 28 U.S.C. § 2253(c)(1)(A) because "the applicant has [not] made a substantial showing of the denial of a constitutional right[,]" under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262-63 (3d Cir.

2000), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012); and,

4. The Clerk of Court shall mark this file closed.

BY THE COURT:

HON. JOHN M. GALLAGHER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN TERRY, Petitioner, v. KEVIN RAMSON, *et al.*, Respondents.	:	CIVIL ACTION No. 20-cv-03521-JMG

REPORT AND RECOMMENDATION

RICHARD A. LLORET
U.S. MAGISTRATE JUDGE

March 15, 2021

Before me is Nathan Terry's Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Doc. No. 17.[1] After a bench trial, Mr. Terry was convicted of aggravated assault, simple assault, terroristic threats, and harassment. Mr. Terry was sentenced to five to ten years in prison on the aggravated assault conviction and was not sentenced on the remaining charges.

In his petition, Mr. Terry raises four claims for habeas relief: that he was wrongfully convicted through the use of unreliable witness testimony, that he was sentenced beyond the deadline imposed by the Pennsylvania Rules of Criminal Procedure, that he did not receive adequate post-trial appeal rights, and that he was sentenced using incorrect legal conclusions from a pre-sentencing report. *See* Doc. No. 17. In response, the Commonwealth submits that all of Mr. Terry's claims are procedurally defaulted because he did not raise any of them before the state courts.

Based upon my review, I find that there are no grounds for relief and respectfully recommend that Mr. Terry's petition be dismissed with prejudice.

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[1] All references to the electronically docketed record will be cited as "Doc. No. ____, at ____."

FACTUAL AND PROCEDURAL HISTORY

When ruling on Mr. Terry's direct appeal, the Pennsylvania Superior Court summarized the facts of his case as follows:

> [Petitioner] was arrested on June 21, 2016, after attacking and injuring his girlfriend. The case was scheduled for trial on February 2, 2017. Before trial began, [Petitioner] signed a form, waiving his right to a jury trial. This document informed [Petitioner] of all the "essential ingredients" of a jury trial. After [Petitioner] signed this waiver, but before the bench trial started, the trial court conducted an oral jury waiver colloquy during which the trial judge asked the assistant district attorney what the standard sentencing guidelines were for aggravated assault. The district attorney responded that the standard range was thirty (30) to forty-two (42) months. Notably, the court mentioned that aggravated assault is a first-degree felony, which carries a maximum sentence of ten (10) to twenty (20) years of imprisonment, and cautioned [Petitioner] that he could receive this statutory maximum if convicted.
>
> The trial court ultimately accepted [Petitioner's] waiver and the case proceeded to a non-jury trial. [Petitioner] was found guilty of aggravated assault. At sentencing, as a result of the Probation Department discovering [Petitioner's] out of state convictions, he was subject to enhanced sentencing of fifty-four (54) to seventy-two (72) months imprisonment. The court imposed a sentence in accordance with these increased sentencing guidelines of five (5) to ten (10) years of imprisonment.

Commonwealth v. Terry, No. 3006 EDA 2017, 2018 WL 2188955, at *1 (Pa. Super. May 14, 2018).

After Mr. Terry was sentenced in the Montgomery County Court of Common Pleas, he appealed to the Pennsylvania Superior Court. Mr. Terry raised one issue on appeal: whether the trial court erroneously found that he knowingly, intelligently, and

voluntarily waived his right to a jury trial when the assistant district attorney gave sentencing guidelines at the waiver colloquy that were lower than the guidelines actually imposed at sentencing. *Id.* On May 14, 2018, the Superior Court dismissed Mr. Terry's appeal and affirmed his sentence, finding that Mr. Terry had not offered any evidence that he relied on the guidelines that the prosecutor provided during the waiver colloquy. *Id.* at *2. The Pennsylvania Supreme Court denied Mr. Terry's application for allowance of appeal.

On January 2, 2019, Mr. Terry filed a pro se "Motion for Correction and Modification of Record" in the Court of Common Pleas of Montgomery County. Doc. No. 25-61, at 2. Mr. Terry again challenged the voluntariness of his jury trial waiver due to the range of sentences provided by the District Attorney and took issue with how long it took the court to sentence him. The court treated this motion as a PCRA petition, and appointed counsel to represent Mr. Terry. Appointed counsel filed an amended PCRA petition challenging the voluntariness of Mr. Terry's jury trial waiver and alleging ineffective assistance of PCRA and plea counsel. On June 13, 2019, after holding a hearing, the PCRA court dismissed the amended PCRA petition. After the trial court allowed Mr. Terry to waive his right to counsel, he proceeded pro se on appeal to the Superior Court. On March 5, 2020, after granting Mr. Terry multiple extensions of time to file his appellate brief, the Superior Court dismissed his appeal for his failure to file a brief. Doc. No. 43, Ex. C.

On January 12, 2020, Mr. Terry filed a pro se petition for extraordinary relief with the Pennsylvania Supreme Court. On April 22, 2020, the Pennsylvania Supreme Court summarily denied Mr. Terry's petition.

On June 24, 2020, Mr. Terry's habeas petition was transferred to this District from the Middle District of Pennsylvania. *See* Doc. No. 1. On August 10, 2020, Mr. Terry filed an amended habeas petition. *See* Doc. No. 17.[2] The petition was referred to me for a report and recommendation. Doc. No. 33.

STANDARD OF REVIEW

Before a federal court may grant a habeas petition to a person in custody from a state court judgment, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires petitioners to have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). This means that the petitioner must have fairly presented his constitutional claims in "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). A federal claim is fairly presented to the state courts when the petitioner has raised "the same factual and legal basis for the claim to the state courts." *See Nara v. Frank*, 488 F.3d 188, 197–98 (3d Cir. 2007).

If a petitioner fairly presents a claim to the state courts but it was denied on a state-law ground that is "independent of the federal question and adequate to support the judgment," then the claim is procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A claim is also procedurally defaulted if the petitioner failed to present it in the state court and would now be barred from doing so under state procedural rules. *McCandless v. Vaughn*, 172 F.3d 255, 263 (3d Cir. 1999). Procedurally defaulted claims cannot provide a basis for federal habeas relief unless the petitioner

[2] Mr. Terry filed two amended habeas petitions within days of each other, but both petitions contain substantially the same four claims. *Compare* Doc. No. 16 (August 5, 2020 amended petition), *with* Doc. No. 17 (August 10, 2020 amended petition). For the purposes of this opinion, I will refer to the more recent amended habeas petition dated August 10, 2020.

shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750.

Where the federal court reviews a claim that has been adjudicated on the merits by the state court, the AEDPA permits the federal court to grant a petition for habeas relief only if: (1) the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) the adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2); *see also Parker v. Matthews*, 567 U.S. 37, 42–45 (2012) (reiterating that the standard under § 2254(d)(1) is highly deferential to state court decisions, and overturning a Sixth Circuit decision granting habeas relief because the state court's decision denying relief was not objectively unreasonable). Factual determinations made by the state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009) (citing to 28 U.S.C. § 2254(e)(1)).

Interpreting this statutory language, the Supreme Court has explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000).

With respect to "the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. As the Third Circuit has noted, "an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000) (citing to *Williams*, 529 U.S. at 411).

DISCUSSION

A. Mr. Terry's first claim is not cognizable on habeas review.

In his first claim, Mr. Terry asserts that he was wrongfully convicted due to the Commonwealth's use of the victim's testimony, who he alleges was cognitively impaired. Doc. No. 17, at 5. The Commonwealth responds that this claim is procedurally defaulted because Mr. Terry is raising it for the first time on habeas review. Doc. No. 43, at 8–10. I find that Mr. Terry's first claim is not cognizable on habeas review, and recommend that it be denied.

It is well settled that "federal habeas corpus relief does not lie for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). The Supreme Court has emphasized that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Id.* at 67–68. Instead, the federal habeas court must only decide "whether a conviction violated

the Constitution, laws, or treaties of the United States." *Id.* at 68 (citing to 28 U.S.C. § 2241, and *Rose v. Hodges*, 423 U.S. 19, 21 (1975)); *see also Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (per curiam) ("The habeas statute 'unambiguously provides that a federal court may issue a writ of habeas corpus to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" (internal quotation marks omitted) (quoting *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (per curiam))). Further, the federal habeas statute "gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983).

Here, Mr. Terry challenges the victim's testimony and asserts that he was wrongfully convicted because the victim's recollection of Mr. Terry's assault was impaired by her drug and alcohol use. Doc. No. 17, at 5. The issue of the credibility of the victim's testimony is one of state law, and I cannot reexamine her testimony to determine whether it was credible. The trial judge was in the best position to assess the credibility of the victim's testimony, and the weight and credibility the judge assigned to the victim's testimony is not reviewable on habeas appeal. *See Marshall*, 459 U.S. at 434. Therefore, this claim is not cognizable on habeas review, and I recommend that it be denied.[3]

B. Mr. Terry's second claim is not cognizable on habeas review.

In his second claim, Mr. Terry alleges that his sentence was untimely under Pennsylvania Rule of Criminal Procedure 704 and that the trial judge failed to timely

[3] Even if Mr. Terry had raised a cognizable habeas claim, he did not raise any issues with the victim's testimony on direct or PCRA appeal in state court. This claim is therefore also procedurally defaulted, as Mr. Terry may not raise it for the first time on habeas review. *See McCandless v. Vaughn*, 172 F.3d 255, 263 (3d Cir. 1999).

address his pre-sentence motion for extraordinary relief. Doc. No. 17, at 7. The Commonwealth responds that this claim is procedurally defaulted. Doc. No. 43, at 8–10. I find that Mr. Terry's second claim is not cognizable on habeas review, and I recommend that it be denied.

This claim suffers from the same defect as Mr. Terry's first claim—federal habeas relief is unavailable for a state court's error in applying state law. *See Estelle*, 502 U.S. at 67. Mr. Terry challenges the trial court's actions under Pennsylvania Rule of Criminal Procedure 704, which only raises questions of state law and is not cognizable on federal habeas review. *See King v. Kerestes*, 09-CV-1749, 2009 WL 5178805, at *4 (E.D. Pa. Dec. 21, 2009) (Diamond, J., approving and adopting report and recommendation of Caracappa, J.) (habeas claim under Pennsylvania Rule of Criminal Procedure 704 raised only a question of state law and was not cognizable on habeas review). Mr. Terry's second claim is not cognizable on habeas review, and I recommend that it be denied.[4]

C. Mr. Terry's third claim is not cognizable on habeas review.

Third, Mr. Terry challenges the state courts' handling of his post-trial right to appeal under the Pennsylvania Rules of Criminal and Appellate Procedure. Doc. No. 17, at 9. The Commonwealth responds that this claim is procedurally defaulted. Doc. No. 43, at 8–10. I find that this claim is not cognizable on habeas review, and recommend that it be denied.

It is unclear what aspects of his post-trial rights Mr. Terry alleges have been violated; he variously challenges the Superior Court's finding that he waived his appeal by not filing a brief and the state courts' alleged failure to file a final order disposing of

[4] Mr. Terry did not fairly present this claim to the state courts, and, like his first claim, it is procedurally defaulted for purposes of federal habeas review.

his case. What is clear, however, is that he is only challenging the state courts' alleged failure to comply with Pennsylvania state law regarding these rights. *See* Doc. No. 17, at 9 (citing only Pennsylvania state law in support of ground three). Once again, Mr. Terry cannot obtain habeas relief based on violations of state law. *See Estelle*, 502 U.S. at 67. Therefore, this claim is not cognizable on habeas review, and I recommend that it be denied.[5]

D. Mr. Terry's fourth claim is not cognizable on habeas review.

Finally, Mr. Terry's fourth claim alleges that he was sentenced pursuant to incorrect conclusions in his pre-sentencing report. Doc. No. 17, at 10–11. The Commonwealth contends that this claim is procedurally defaulted. Doc. No. 43, at 8–10. I find that this claim is not cognizable on habeas review, and recommend that it be denied.

Mr. Terry argues that his sentence reflected incorrect information from his pre-sentencing report and cites federal sentencing statutes—28 U.S.C. § 994 and 18 U.S.C. § 3742—in support of his argument that I can review his state court sentence. But, "absent a Constitutional violation, a federal court has no power to review a sentence in a habeas corpus proceeding unless it exceeds the statutory limits." *Smith v. Kerestes*, No. 08-0061, 2009 WL 1676136, at *16 (E.D. Pa. June 15, 2009) (Schiller, J.) (citing *Hoagland v. Neubert*, No. 88-2167, 1988 WL 81771, at *2 (D.N.J. Aug. 1, 1988)). Here, Mr. Terry has not alleged any constitutional violations by the state sentencing court, and I cannot review his sentence. The federal statutes he cites are inapplicable to state sentences and cannot overcome his failure to allege a constitutional issue with his state sentence.

[5] Like his first two claims, even if Mr. Terry had raised a cognizable third claim, he did not fairly present it to the state courts and it is procedurally defaulted on habeas review.

Therefore, I recommend that Mr. Terry's fourth claim be denied as not cognizable on habeas review.[6]

RECOMMENDATION

Based upon the discussion above, I respectfully recommend that Mr. Terry's petition be dismissed with prejudice. I recommend that no certificate of appealability issue because "the applicant has [not] made a substantial showing of the denial of a constitutional right [,]" under 28 U.S.C. § 2253(c)(2), because he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262–63 (3d Cir. 2000), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012).

Parties may object to this report and recommendation under 28 U.S.C. § 636(b)(1)(B) and Local Rule of Civil Procedure 72.1 within fourteen (14) days after being served with the report and recommendation. An objecting party shall file and serve written objections that specifically identify the portions of the report or recommendations to which objection is made and explain the basis for the objections. Failure to file timely objections is likely to constitute waiver of any appellate rights. *See Leyva v. Williams*, 504 F.3d 357, 364 (3d Cir. 2007). A party wishing to respond to objections shall file a response within 14 days of the date the objections are served.

BY THE COURT:

s/Richard A. Lloret
RICHARD A. LLORET
U.S. Magistrate Judge

[6] As with Mr. Terry's other claims, he did not fairly present his claim regarding alleged pre-sentencing report inaccuracies to the state courts. Therefore, it is also procedurally defaulted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN TERRY, Petitioner, v. KEVIN RAMSON, *et al.*, Respondents.	: : : : : : :	Civil No. 2:20-cv-03521-JMG

JUDGMENT

In accordance with the Court's separate Order, filed contemporaneously with this Judgment, on this 13th day of April, 2021,

JUDGMENT IS ENTERED

DENYING and **DISMISSING WITH PREJUDICE** Petitioner's Amended Petition for Writ of Habeas Corpus (ECF No. 17).

BY THE COURT:

/s/ John M. Gallagher
JOHN M. GALLAGHER
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NATHAN TERRY, Petitioner, v. KEVIN RAMSON, *et al.*, Respondents.	:	Civil No. 2:20-cv-03521-JMG

ORDER

AND NOW, this 13th day of April, 2021, upon careful and independent consideration of Nathan Terry's Amended Petition for Writ of Habeas Corpus (ECF No. 17), the Commonwealth's response in opposition (ECF No. 43), the Report and Recommendation of U.S. Magistrate Judge Richard A. Lloret (ECF No. 58), petitioner's objections thereto (ECF No. 60), and petitioner's motions to amend the habeas petition (ECF Nos. 59 and 65), we find as follows:

1. On August 10, 2020, Nathan Terry filed an amended petition for writ of habeas corpus. (ECF No. 17.) The case was ultimately referred to United States Magistrate Judge Richard A. Lloret. (ECF No. 33.) Judge Lloret issued a Report and Recommendation on March 16, 2021. (ECF No. 58.)

2. On March 29, 2021, Mr. Terry filed objections to the Report and Recommendation. (ECF No. 60.) The objections appear to raise, for the first time, an "actual innocence" claim. (*Id.* at 4.) Even if this freestanding claim was cognizable, it does not meet the "extraordinarily high" standard necessary to prevail. *See Wright v. Superintendent Somerset SCI*, 601 F. App'x 115, 119–20 (3d Cir. 2015) (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)). The remaining objections are meritless and do not undermine Judge Lloret's well-

reasoned Report and Recommendation.

3. After the issuance of the Report and Recommendation, Mr. Terry also filed two motions to amend his habeas petition. (*See* ECF Nos. 59 and 65). At the outset, Mr. Terry's motions violate LOCAL CIVIL RULE 72.1(IV)(c). Under that rule, "[a]ll issues and evidence shall be presented to the magistrate judges, and unless the interest of justice requires it, new issues and evidence shall not be raised after the filing of the Magistrate Judge's Report and Recommendation if they could have been presented to the magistrate judge." LOCAL CIV. R. 72.1(IV)(c).

4. Nevertheless, "[l]eave to amend a habeas corpus petition may be granted for the same reasons that a pleading in a civil action may be amended." *Anderson v. Vaughn*, No. 00-1185, 2000 WL 1763672, at *1 (E.D. Pa. Nov. 30, 2000); *see also* FED. R. CIV. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Justice does not require that we grant petitioner's motions to amend. Petitioner could have requested leave to further amend his habeas petition before Judge Lloret submitted the Report and Recommendation. *See Pressley v. Coleman*, No. 12-4006, 2013 WL 3176799, at *1 (E.D. Pa. June 24, 2013) (denying leave to amend where petitioner "could have sought leave to amend prior to the submission of the Report and Recommendation"). Respondents would be prejudiced by further amendment, as the habeas petition has been fully litigated. *Id.* And, above all, Mr. Terry "does not set forth any facts that would cure the deficiencies noted by Judge [Lloret]—that all of Petitioner's claims are not cognizable and procedurally defaulted." *Id.*

WHEREFORE, it is **HEREBY ORDERED** that:

1. The Report and Recommendation of Magistrate Judge Richard A. Lloret (ECF No. 58) is **APPROVED** and **ADOPTED**;

2. Mr. Terry's Amended Petition for Writ of Habeas Corpus (ECF No. 17) is **DISMISSED** with prejudice by separate Judgment, filed contemporaneously with this Order. *See* Federal Rule of Civil Procedure 58(a); Rules Governing Section 2254 Cases in the United States District Courts, Rule 12;

3. **NO CERTIFICATE OF APPEALABILITY SHALL ISSUE** under 28 U.S.C. § 2253(c)(1)(A) because "the applicant has [not] made a substantial showing of the denial of a constitutional right[,]" under 28 U.S.C. § 2253(c)(2), since he has not demonstrated that "reasonable jurists" would find my "assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see United States v. Cepero*, 224 F.3d 256, 262–63 (3d Cir. 2000), *abrogated on other grounds by Gonzalez v. Thaler*, 565 U.S. 134 (2012);

4. Mr. Terry's "Motion to Amend § 2255 Remedies" (ECF No. 59), "Motion to Objection to the Report and Recommendation" (ECF No. 60), and "Motion to Amend Second Claim on Habeas Review" (ECF No. 65) are **DENIED**; and

5. The Clerk of Court shall mark this file **CLOSED**.

BY THE COURT:

/s/ John M. Gallagher
JOHN M. GALLAGHER
United States District Court Judge

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 13 MM 2020
Respondent	:	
v.	:	
NATHAN TERRY,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 2nd day of June, 2020, the "Application for Reconsideration and Motion for Judgment on the Pleading" and the "Application for Leave of the Court under Post Submission Communication 2501(a) to Amend" are DENIED.

A True Copy Elizabeth E. Zisk
As Of 06/02/2020

Attest: _____
Chief Clerk
Supreme Court of Pennsylvania

EXHIBIT

A

IN THE SUPERIOR COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania
Respondents,

v. Superior Court No. 1745EDA-19

Nathan Terry
~~Appellant~~,

REQUEST FOR CORRECTION OR MODIFICATION OF THE RECORD
PURSUANT TO RULE OF APPELATE PROCEDURE SEC. 1926

And Now comes, Appellant, Nathan Terry pro se, in the above Caption Matter For Correction or Modification of the record to Reflect Accurate Filings Information From The Inventory List For Review.

In the matter of the certified record forwarded to this court, I, Nathan Terry am requesting Public Importance, extraordinary relief. The certified record has vacuumed an existing event where as the proper required notification were given on. Official Docket entry awaiting Post-Sentence motion hearing. Created by same process filings information and status information. Generated for Criminal case file and Docket entries pursuant to Rule 113. Sequences 1 and 2 09/05/2017 Pro Se correspondence and motion for new trial. The appellants correspondence forward to the attorney of record is blindsiding the appellants filing is not Hybrid representation. The appellant was abandoned and left with no alternative but to file Pro Se due to the disposition at sentencing. Ten days or be waived timely filed for a new trial. The appellant recieved by court calendar schedule. Awaiting post sentence motion hearing docketed on 09/05/2017. Although never recieved an answer in accordance to the operation of law. Rule 720(B)(3)(C) or Rule 114. Under In re Bruno, 101 A3d at 659 citing Pa. Const. art v. §2; 42 Pa. C.S. § 502 Article v Section 2 of the Pennsylvania Constitution. I, Nathan Terry, am respectfully asking this court to derive power and the authority and the attendant jurisdiction over the subject matter. And remand the case to another judge and/or decide yourself to release the appellant with prejudice after fact checking the claim.

EXHIBIT B

To: The Three Judge Panel
Re: 1745 EDA 2019
Record Inventory List
Pursuant to Trial Court Docket No. CR-5665-2016

Clear and convincing on October 2, 2017 filed in Superior Court of Pennsylvania. (Criminal Docketing Statement) Attorney John C. Armstrong counsel for the appellant inappropriately filed an notice to appeal judgment of sentence. Unanswered correctly If post sentence were filed no date was given. If post sentence motion were decided no date was given. (Pusuant to the operations of law Rule 720(B)(3)(C) and Rule 114. No answer was given by the Clerk of Courts). Structural daming to protection of the appellants right to appeal. (Under Rule 720(B)(3)(C)). (Court of Common Pleas of Montgomery County) Positive evidence notice by Administrator concerning calendar scheduling. For the proceeding requiring the appellant's presence. Under PA. R.A.P. 108 Frazier v City of Philadelphia. 557 Pa. 618, 735 A2d 113, 115 (Pa.1999) (Date of entry) On 09/05/2017 (Awaiting Post Sentence Motion Hearing) Proceeded by an direct appeal. The appellant's Post Trial Rights/ Post Sentence motion timely filed in accordance to Pa. R.A.P. 108 and 607(a). Never recieved a compliance to the operation of law being denied or granted. (By the rule 720(B)(3)(C) and Rule114).

See, Pa. R.A.P. 108 See, also Commonwealth v. Miller 715 A2d 1203 (Pa. Super. 1998) U.S. District Court Third Circuit. No direct appeal may be taken while an defendant post-sentence motion is pending.

A criminal defendant's constitutional rights are violated when inaccuracies adversely affect the criminals outcome in proceeding See, Tedford v. Heming, 990 F.Ed2d 745, 747 (3d cir. 1993)

Pursuant to the Record Inventory List-Trial Court Docket No. CR-5665-2016 Comm. v. Terry, Nathan

Sequence (1) Filed Date 09/05/2017 Pro Se, Correspondence Comment -s: Forward to the attorney of record/Motion for New Trial/Post-Verdict Rule 704

Sequence (2) 09/05/2017 Motion for NewTrial-Official Docket Entry

Structural Error the sequences are inaccurate to Court Of Common Pleas Of Montgomery County Criminal Docket court case page (1of13) cross court docket nos: 3006 EDA 2017
09/05/2017 Status Date and Processing Status (Awaiting Post-Sentence Motion Hearing)

The Status information is created by the same filings information by the Court of Common Pleas of Montgomery County.

Under Rule 113. (Criminal Case File Docket Entries) The Clerk of Courts failed to maintain a correct accurate chronological list. of all the proceeding in the case on information filings. Record Inventory list for appellate Court review. Awaiting Post-Sentence Motion Hearing evidence withheld by Trial Court and the Criminal Case file and Docket Entries in the appellants favor. The suppressed evidence adversely affects the minds of the panel.

The Commonwealth must exercise good faith to disclose all material evidence in it's possession or control regardless whether the evidence may be used in rebuttal or it's case in chief. Commonwealth v. Thiel 32 Pa. Super. 92, 420 A.2d 145 (1983)

Pursuant to Brady v. Maryland, 373 U.S. 83, 87 Ct. 1194 10 L.ED 2d 215 (1963) When the defendant states the evidence is material, the destruction of the evidence is a violation of Brady.

Concealing on a filings Information Entry Classification. Official Docket Entry, destruction of the evidence.

The failure to raise the claim previously was the result of inter-ference by government officials with the presentation of the claim in violation of the constitution . . . Led to a conviction of an innocent person is not time barred. McQuiggen v. Perkins, 12-126 (5/28/13). Pursuant to U.S. Supreme Court Gate way Claim,

Montgomery County Court of Common Pleas erred a structural error. And have committed a miscarraige of justice by allowing a direct appeal to proceed over a post-sentence motion while pending. A breakdown in illegal process where the court failed to deal with the pending Post-Trial Rights/Post-Sentence motion. Wherefore the appellant is requesting Public Importance, Extraordinary Relief.

Under Strickland v. Washington, 104 S.ct. 2052 (1984) 80 L?ed.2d 674. Prejudice- but for error or omission would have been different. Per the Pennsylvania courts three part test. Pursuant to Inappropriate filing a notice of appeal.(By counsel).

The structural error is public importance (3½yrs.) Three and a half years incarcerated by an wrongful conviction. Prohibiting due process is an constitutional violation of appellants 14th Amendment.

Under Art. 1.S.9. by the Federal Constitution and Pennsylvania Constitution and laws of the Commonwealth and the United States Constitution.

The record created at sentencing on page 30 trial by judge at 20-21 Mr. Armstrong: "I ask that it be made part of the record." Pursuant to line 12 The Court: "Do you want to give him his post-trial rights?" (Page 3( ). (at 4) (Post-Sentence Proceedures marked D-1 for indentification).

Question, Why have Mr. Terry failed to recieve an Post-Sentence Motion hearing?

It is well established that all Pennsylvania courts derive power or authority and the attendant jurisdiction over the subject matter from the constitution and laws of the Commonwealth. In re Bruno 101 A.3d at 659 citing Pa. Const. art.V§2,42 Pa.C.S.§502 Article V. Section 2 of the Pennsylvania Constitution.

Wherefore under Public importance Extraordinary Relief, I, Nathan Terry am requesting an immediate correction to an miscarraige of justice by the lower court of Montgomery County.

The Appellant's brief supports the factual accuracies, and sentence beyond 90 days with no specific time shown for good cause on record. Along with sentence by inccorect legal conclusion.

Under Public Importance Extraordinary Relief, I Nathan Terry, ask that the following exhibits to show beyond any shadow of doubt of actual constitutional violation. Leading to an conviction of an innocent person. And by doing so a miscarraige of justice.

Pursuant to Commonwealth v. Szuchon, 633 A.2d 1098, 1099 (Pa.1993) citing Commonwealth v. Lawson 549 A.2d 107 (1998) When a defendant can demostrate (1) either a miscarraige of justice occured which no civilized society would tolerate, and (2) the defendant was innocent of the crime charged. See Commonwealth v. Szuchon 633 A.2d 1098, 1100 (Pa.1993).

Pursuant to Pennsylvania Courts derive power or authority and the attendant Jurisdiction over subject matter. I am pleading to this court to act immediately without haste. After further examination of exhibits and fact checking the appellants claim.

Respectfully Submitted,

S/ Nathan Terry

Mr. Nathan Terry

11-4-2019

EXHIBIT

B

Filed 12/16/2019

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
NATHAN TERRY,	:	No. 1745 EDA 2019
	:	(C.P. Montgomery County
Appellant	:	No. 46-CR-0005665-2016)

ORDER

Appellant's *pro se* "Request for Correction or Modification of the Record Pursuant to Rule of Appellate Procedure Sec. 1926 [sic]," is DENIED without prejudice to apply to the Court of Common Pleas of Montgomery County for the requested relief.

PER CURIAM

EXIBIT A

AFFIDAVIT OF THE CASE